

No. 21866

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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EQUITABLE SAVINGS AND LOAN ASSOCIATION,  
*Petitioner,*  
*vs.*

HONORABLE PEIRSON M. HALL, JUDGE OF THE UNITED  
STATES DISTRICT COURT FOR THE CENTRAL DISTRICT  
OF CALIFORNIA,  
*Respondent.*

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## REPLY BRIEF FOR PETITIONER.

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**REPLY BRIEF FOR PETITIONER.**

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**Preliminary Statement and Summary of the  
Litigation Below.**

The Return and Answer that has been filed here is noteworthy for the assiduousness with which it avoids discussion of the basic and determinative question presented by the petition. That question is *not* whether the post-judgment orders made below [see, *Petition*, 12-25] were correct on their respective merits; it *is* whether the issues purportedly determined by those orders were properly cognizable in these proceedings. [See, *Petition*, 5-7.] They were not so cognizable, because they presented no "case or controversy" within the meaning of section 2 of article III of the Constitution of the United States; because they were wholly outside the fair scope of the only case or con-

troversy that was before the court below; because they were not within the court's subject-matter jurisdiction; and because they were disposed of summarily upon motion, rather than by plenary actions in which issues were duly tendered and joined, evidence was taken, and an opportunity to be fully heard in accordance with "such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . ." was afforded. [See, *Muskrat v. United States*, 219 U. S. 346, 356-357, 31 S. Ct. 250, 253-254. Also, *Petition*, 12-29, 36-38.] That is the question respondents do not discuss. Yet, unless it is answered, as we submit it may not correctly be, in favor of the cognizability of those issues, the great bulk of the Return and Answer is merely an irrelevancy.<sup>1</sup>

The force of what we have just said may best be shown by a short summary of the procedural and historical context in which these writ proceedings arise. The story in this connection is actually a long one, al-

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<sup>1</sup>The post judgment petitions and motions pertain essentially to: (1) the \$110,000 of certificates of deposit; (2) the so-called Installment Charity Trust; and (3) the tax matters of Equitable Savings and Loan Association. [*Petition Appendix*, 3-24.] All parties concede that none of these issues arose until after the change in Equitable's management, which occurred in June, 1966 subsequent to the hearing on the attorney's fee question and shortly before the judgment for attorneys' fees was entered. To sustain respondents' position it must be held that the court's reservation of jurisdiction included a reservation of jurisdiction over disputes *not yet in existence*. Respondents advance no argument to explain how a trial court can reserve jurisdiction over disputes which may occur some time in the future and which by definition could not have existed when the pleadings were filed.

though, fortunately only a small part of it is needed for present purposes.<sup>2</sup>

In late 1959, after 13 years of litigation arising out of its seizure by the Federal Home Loan Bank Board, Long Beach began negotiating to merge into a State savings and loan association and become a part of the California state-chartered Equitable Savings & Loan Association. That merger was accomplished pursuant to an agreement executed under date of June 12, 1963, under which, with a view to the ultimate dissolution of Long Beach, as the respondent judge has said [*Elliott v. Federal Home Loan Bank Board, supra*, 233 F. Supp. at 585], Long Beach was merged into Equitable.<sup>3</sup> Under the merger agreement, the depositors of

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<sup>2</sup>The story of the instant litigation begins 21 years ago when the appointment of a conservator for Long Beach Federal Savings & Loan Association [hereinafter called simply "Long Beach"] was challenged in an action in the then Southern District of California, which was assigned to Honorable Peirson M. Hall, the respondent judge. Since then 20 or more reported decisions have resulted—they are enumerated by the respondent judge in *Elliott v. Federal Home Loan Bank Board*, S.D. Cal., 233 F. Supp. 578, 584 (fn. 1). Practically all of the great and seemingly endless mass of litigation has been before the respondent judge, by virtue of the operation of the so-called "low-number" rule in the old Southern, now Central District. [See, C. D. Cal. Local Rules, rule 2(g).] A summary of this history prepared by the respondent judge, will be found in *Long Beach Fed. S. & L. Assn. v. Federal Home Loan Bank Board*, S. D. Cal., 189 F. Supp. 589, 597 (fn. 3); and *Elliott v. Federal Home Loan Bank Board, supra*, 233 F. Supp. at 584-585. Local Rule 2(g), in relevant part, provides that all "pending civil actions and proceedings [which appear to arise from the same or substantially identical transactions, happenings or events] shall be assigned to the judge to whom was assigned . . . the case bearing the lowest number . . ."

<sup>3</sup>Unless otherwise attributed, the statement of facts relating to the protracted litigation below and related events, is taken from the respondent judge's summary of them in *Long Beach Fed. S. & L. Assn. v. Federal Home Loan Bank Board, supra*, 189 F. Supp. at 597-598; and *Elliott v. Federal Home Loan Bank Board, supra*, 233 F. Supp. at 584-585.

Long Beach were to receive a specified number of shares of Equitable stock, proportioned to the amount of their respective deposit balances, after certain specified adjustments, as of November 30, 1962. [*Petition Appendix*, 142-143.] Long Beach's charter provided for equal and pro rata distribution to all of its depositors in proportion to their deposit balances. The distribution of the stock obviously will be substantially different, depending on whether the agreement or the charter prevails. [*Petition Appendix*, 83-87.]

An immediate controversy arose as to which of these two formulas of distribution was to control. Three actions were precipitated by that controversy, which were consolidated and disposed of in one judgment.<sup>4</sup> Two of these actions purported to be class actions brought in behalf of the depositors of Long Beach. One was origi-

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<sup>4</sup>The only issues in these actions, and the only controversy alleged, related to (1) whether the agreement or charter formula of distribution of the stock prevailed; and (2) whether the attorney for the plaintiff Shareholders Protective Committee, should be allowed fees. There was no issue relating to or request made for fees for plaintiff Long Beach or its attorney. And, while in one of the complaints Long Beach alleged a purported claim for "declaratory relief and instructions" [*Petition Appendix*, 48-50] no controversy was alleged. Long Beach was not a plaintiff in the other two actions.

All of this was recognized by the respondent judge, for in one of his opinions he noted that the "central and ultimate question for decision is a limited one . . . Here the stock in Equitable is the thing in dispute and Equitable seeks to know its duty as to whom the stock should be issued" [*Elliott v. Federal Home Loan Bank, supra*, 233 F. Supp. at 583, 588.] In another opinion he said that, "All of the suits, in effect, sought the same relief, viz., to have said 791,650 shares of Equitable Association's stock deposited in court, distributed according to the terms of the statute, the by-laws of Long Beach, the Settlement Agreement of February 14, 1962, and the passbook issued to the shareholders of Long Beach . . ." [*Petition Appendix*, 247-248.] He did not, however, permit his subsequent actions in the cases to be confined to this one "limited" question.

nally brought in the United States District Court, Central District Court; the other in the State Superior Court for Los Angeles County, and removed to the former court. The pleadings in each were virtually identical.<sup>5</sup> Except for the purported declaratory relief claim in the Federal case, in respect to which no controversy was alleged, these complaints concerned themselves solely with an alleged controversy over the proper distribution formula for the Equitable stock and an alleged forfeiture of the depositors' rights sought to be effected by the merger agreement [*Petition Appendix*, 26, 29-33, 35-42, 43-47, 51-56, 58-64]; and with a request for an allowance of attorney's fees to the plaintiff Shareholders Protective Committee.<sup>6</sup> [*Petition Appendix*, 42, 67-68.]

The third action was an interpleader and declaratory relief action brought by Equitable to resolve the conflicting claims made upon it in respect of the stock to be distributed to the depositors of Long Beach.<sup>7</sup> The

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<sup>5</sup>In the State Court action, Long Beach was not a party-plaintiff, and so there was in it no counterpart of the claim for "declaratory relief and instructions" found in the Federal case. There was, however, a count for declaratory relief in respect of an actual, existing controversy, over, but *only* over, the rights of the depositors in and to the Equitable stock, as affected by the merger agreement and the Long Beach charter. [*Petition Appendix*, 68-71.]

<sup>6</sup>Note that in the only case in which Long Beach is a plaintiff, the allegation relating to fees found in paragraph VI of the First Claim for Relief [*Petition Appendix*, 42-43] is not re-alleged in Long Beach's claim for "Declaratory Relief and Instructions." [*Petition Appendix*, 48, paragraph I.]

<sup>7</sup>The complaint, though signed by Moore & Lindelof, was in fact prepared, at least in first draft, by Charles K. Chapman, who was then, and he now claims to be, attorney for Long Beach. [See, *Supp. Appendix*, p. 19, lines 20-29.] Nevertheless, he named Long Beach as one of the parties-defendant, alleging its continued existence notwithstanding it had been merged into Equitable. [*Petition Appendix*, 76, paragraph 3.]

only controversy alleged and the only issues of fact tendered by that complaint related strictly to the question of how and by what formula the stock should be distributed.<sup>8</sup> [*Petition Appendix*, 76-91].

A so-called "class action judgment" in the consolidated actions was entered, from which an appeal to this Court has been taken by the government defendants. That judgment, together with the "judgments for attorneys' fees" disposed of all the issues tendered or joined in the three actions, *i.e.*, distribution of the stock and allowance of fees to the Committee's attorney. [*Petition Appendix*, 101-118.] It was not, however, the end of the litigation. Since entry of those judgments, various motions have been made by counsel for Long Beach and entertained by the respondent judge. These motions and the rulings on them have had the effect of subjecting petitioner Equitable to the same kind of supervision and control by the respondent judge as though it had been put in the hands of an equity re-

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<sup>8</sup>One paragraph of the prayer, taken out of context and read by itself, seems to go beyond this controversy [*Petition Appendix*, 90-91]; and it is the one upon which respondents mainly, if not entirely, rely as the basis for the various post-judgment orders that have been made by the respondent judge. Even in language, however, that paragraph may be read as limited to relief in respect of the rights of the parties in and to the stock that was the sole subject-matter of the action and the certificate for which had been deposited with the Court. It must be so read, when it is kept in mind that the only controversy alleged related only to those rights; that "Federal courts have jurisdiction only where a case or controversy is involved . . ." [*Flight Engineers International Assn. v. Continental Airlines*, 9 Cir., 297 F. 2d 397, 401-402]; and that the prayer is no part of the charging allegations of a complaint and cannot serve to enlarge the complaint to include a claim or cause of action not embraced within the allegations of fact, since "the prayer for relief is in fact no part of the claim or case of action stated" [*Peitzman v. City of Illmo*, 8 Cir., 141 F. 2d 956, 962, *cert. den.* 323 U.S. 718.]

ceiver or other officer subject to the court's control. Nor is that merely a transient condition. The import of the orders in question is to continue that subjection to the court's supervision and instructions into the indefinite and unlimited future, with respect to any matter relating to the duties or obligations of any of the parties under the merger agreement or the so-called "Installment Charity Trust."<sup>9</sup>

Any time, therefore, that plaintiffs' counsel is so advised, he may apply to the respondent judge for instructions, advice or a ruling on any matter connected with Equitable's business that has any conceivable relation to the former activities of Long Beach; and thus force Equitable into summary proceedings in place of its right to have its rights determined only after a full and orderly hearing had according to the mode and in the plenary proceedings established by the law of the land. So, this is not simply a case of the rendition of an order or two, from which relief may be obtained by an appeal. It is a case of a crass usurpation

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<sup>9</sup>That is shown by the fact that a motion for an "order to all parties adjudging, declaring and ordering all parties to discharge their respective duties and obligations under: A. The Merger Agreement . . . and B. The Installment Charity Trust" was made by Long Beach and Mr. Chapman [*Petition Appendix*, 183, 203-205] and granted. [*Petition Appendix*, 206-208.] It is also shown by the fact that the principal petition filed by Long Beach requested, among other things, instructions "from time to time" with respect to the conduct of numerous litigations and the "use, holding or payment" of the Certificates of Deposit, [*Petition Appendix*, 119, 134. Also, see footnote 10, *infra*.] See, also, in this regard, Mr. Chapman's description of the scope and extent of the tax and merger matters with which he would not *then* trouble the court. His statement is quoted at page 23 of the petition. Implicit in it is the intention to bring those matters before Judge Hall from time to time in the future, presumably in summary fashion, as Mr. Chapman has done with the other matters to which this writ proceeding is directed.

of power by the respondent judge and the consequent deprivation of the petitioner's right to due process of law.

As the result of these post-judgment proceedings Equitable has already been subjected summarily to the following orders:

1. That the Clerk of the Court below accept from Long Beach the deposit of 16 Certificates of Deposit in the aggregate sum of \$110,786.89, payable to the Clerk of the Superior Court, Los Angeles County, Long Beach Branch; and that the parties, including Equitable appear and show cause why the Petition of Long Beach for Instructions re Conduct of Pending Litigation and Use of Assets [*Petition Appendix*, 119-134] should not be granted and the relief and court orders asked therein should not be ordered.<sup>10</sup> [*Petition Appendix*, 3-5, 13.]

2. That the proceeds of the aforesaid Certificates of Deposit be invested and reinvested by the Clerk in short-term U. S. Treasury Bills, pending further order of the court, the final disposition and ownership of said Certificates and their pro-

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<sup>10</sup>The "relief and court orders asked therein" included the prayer that Long Beach be directed by the court below "from time to time concerning the further prosecution, defense or other conduct" of various pending actions in which Long Beach, notwithstanding its merger into Equitable, asserts it is a party. The petition leaves the number of such actions uncertain [see, e.g., *Petition Appendix*, 925 (paragraph B-3), 126 (paragraph B-5)]; but there are alleged certainly not less than ten of them. [*Petition Appendix*, 122-126.] Even in a case in which an equity court will customarily entertain a petition for instructions, as for example a trustee of a trust over which the court has supervision, an advisory order will not be made; there must, as in any case, be an actual controversy affecting the rights of the parties. [*Gillette v. Gillette*, 122 Cal. App. 640, 10 P.2d 760, 761-762.]

ceeds of the dividend check hereinafter in subparagraph 4 referred to, having been taken under submission by the court. [*Petition Appendix*, 23-24.]

3. Order declaring, notwithstanding that Long Beach has been merged into Equitable, that “the separate corporate existence of [Long Beach] yet continues. Said association has not been dissolved but is yet a separate corporate entity . . . and as such has the right to choose its own counsel to represent said association in pending or other litigation and in other matters.” [*Petition Appendix*, 6, 9 (paragraph 1), 11 (paragraph 1).]

4. That the Clerk of the court below endorse a dividend check for \$26,400.70, cash it, invest the proceeds in U. S. Treasury short term bills, and re-invest as the bills mature. [*Petition Appendix*, 11-12 (paragraph 3).]

5. That Equitable “serve on all parties and file with this court a report of the present status of all California Franchise and Corporation and Bank Taxes and all U. S. income or other taxes asserted against or imposed upon Long Beach Federal since the merger . . . or resulting from the merger.”<sup>11</sup> [*Petition Appendix*, 20 (para-

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<sup>11</sup>Under the merger agreement, Equitable became “subject to all the debts and liabilities of Long Beach as though Equitable had incurred them . . .” [*Petition Appendix*, 138, 140]; and it agreed “to assume and discharge each and every obligation of Long Beach, including, without in any way limiting the generality of the foregoing, all income, franchise, sales and other tax liabilities incurred for all taxable periods to the said effective date; and to assume the performance of all contractual [sic] and other obligations of Long Beach incurred prior to the

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graph 2).] The content of the report thus ordered was spelled out in detail in the order; and, it was further ordered, “representatives of Long Beach Federal, including Attorney Charles K. Chapman . . . and Attorney George W. Trammell for . . . the Shareholders’ Protective Committee . . . and Attorney Harvey Grossman for Intervenor N. Joseph Ross, shall each be entitled to notice of, and to participate in, any and all future tax hearings, conferences, negotiations or discussions with any State or Federal Tax agents or representatives concerning said taxes . . .” [*Petition Appendix*, 20-21 (paragraph 3); i.e., “taxes asserted against or imposed upon Long Beach Federal since the merger . . .”<sup>12</sup> [*Petition Appendix*, 20-21 (paragraph 1). Italics ours.]

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*effective date* and to indemnify and hold harmless Long Beach . . . with respect to such liabilities and obligations . . .” [*Petition Appendix*, 13 (art. XIII). (Italics ours.).]

In view of the type of tax liability feared by respondents, because of which they claim the right to have a report and notice of liability for taxes and the right to participate in hearings relative to such liability, it is important to note that Equitable was not subjected to and did not assume any obligation or liability for taxes, or anything else, that was not incurred by Long Beach *before* the effective date of the merger agreement; and it assumed no liability or obligation of any kind, and irrespective of the date incurred, for any tax liability incurred by or imposed upon any Long Beach shareholder or depositor.

<sup>12</sup>Before making this order, the respondent judge, in the course of a discussion of the extent of Equitable’s assumption of Long Beach’s tax liability, inquired of Equitable’s counsel if they were in a position “to state that if tax liability is imposed on Equitable as a result of the merger [*not*, it should be noted, a tax liability incurred by Long Beach before the merger, see footnote 11, *supra*] that that . . . will not be shifted . . . to only the Long Beach depositors . . .” [*Return and Answer*, 39-40.] After conferring with their client, counsel replied that Equitable’s assumption of liability under the merger agreement “remains in full force and effect and will continue in full force

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To the extent the relief and orders embraced in the motions and petitions filed by Long Beach have not been disposed of by the orders already made, the respondent Judge reserved his asserted jurisdiction and had fixed a date for further hearing.<sup>13</sup> [*Petition Appendix*, 16, 21.] It is apparent, therefore, that he intends to act, and when free of this Court's stay will act, upon the omnibus requests for instructions and other forms of relief that are embraced in those motions and petitions. [See, e.g., *Petition Appendix*, 134 (directions "from time to time concerning conduct of various litigations"); 119 (instructions re "use of assets"); 183 (order requiring "all parties to discharge their respective duties and obligations" under the merger agreement and the "Installment Charity Trust.").]

The gross disregard of established and accepted modes of procedures, the usurpation of judicial power, and the threat to Equitable's independence and right to manage its own business, exhibited by these proceedings, certainly present the "extraordinary situation" to which a writ of mandate or prohibition may and should be directed [See, *Petition Appendix*, 287-297.]

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and effect throughout the tenure in office of present management." Counsel for the committee commented that this did not meet "the requirements of the court's question in any way." The respondent judge agreed with that comment, pointing out that "nobody can outguess the Internal Revenue Bureau, and conceivably they may try to impose an additional tax on *Equitable* as a result of the merger." [*Return and Answer*, 42-43. *Italics ours.*] The point that seemed to elude the Judge was that Equitable did not assume any and every tax imposed "because of the merger" on anyone, but only such tax as *Long Beach*, and only Long Beach, incurred *before* the merger.

<sup>13</sup>F.R.C.P., rule 54(b) may not be invoked to confer a continuing jurisdiction when the only claim for relief presented has been adjudicated and final judgment rendered. [*CMAX, Inc. v. Drewry Photocolor Corp.*, 9 Cir., 295 F. 2d 695, 697, and the numerous cases there cited.]

## ARGUMENT.

### I.

#### There Was No Case or Controversy Before the Court Below in Respect of the Matters Involved in the Post-Judgment Orders.

Not a one of the post-judgment orders to which we have referred responded to any issue tendered, or controversy between the parties alleged, in the cases in which they were rendered. They were, therefore, made in excess of the court's jurisdiction, for, in respect of them, there was no case or controversy before the court. The United States Constitution, art. III, sec. 2, of course, limits the jurisdiction of the courts of the United States to actual cases or controversies, as this Court has noted. [*Flight Engineers International Assn. v. Continental Air Lines*, *supra*, 297 F. 2d at 401-402.] “. . . By cases and controversies,” the Supreme Court has authoritatively said, “are intended the claims of litigants brought before the courts for determination by such *regular proceedings as are established by law or custom* for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs . . . the judicial power conferred by the Constitution . . . is the right to determine actual controversies between adverse litigants, *duly instituted* in courts of proper jurisdiction . . .” [*Muskrat v. United States*, 219 U. S. 346, 356-357, 361-363, 31 S. Ct. 250. Italics ours. To the same effect: *In re Pacific Ry. Commission*, C.C.Cal., 32 Fed. 241, 255-257 (Field, Circ. Justice); *United States v. Choate*, 5 Cir., 276 F. 2d 724, 728.]

The proceedings by which the orders here in question were obtained were not “duly instituted;” they were not

“such as are established by law or custom.” [See, *Petition Appendix*, 270-274, 282-287, 296-297. Also, Point I, 4, *infra*.] They were not instituted by a complaint in which a controversy affecting some justiciable right or duty of the parties was alleged; and in respect of which the trial and other procedures provided by the Rules of Civil Procedure were made available and used. Instead, they were instituted simply by motion, in a case in which no issue respecting the subject of the motions had been raised; and they were heard and determined summarily rather than in a full and open trial on the merits. There was, therefore, no case or controversy before the court below, so far as concerns any of the rights or duties purportedly adjudicated by these orders.

**1. The Deposit With the Clerk of the Certificates Did Not Give the Court Jurisdiction to Determine Any Claims of Ownership or Interest in Them.**

An apt illustration of the application of the “case or controversy” rubric to a situation not unlike one of those here involved is *United States v. Drossner*, 3 Cir., 179 F. 2d 509. There, money taken by the FBI from some thieves of government property, was used in evidence. After the trial in which the money was used had been completed, the U. S. Attorney gave it to the Clerk of the Court for deposit in the registry of the court. The asserted owner of the money petitioned the court for its return to him. On an appeal from the order made on that petition, the Court of Appeals held that the Court below was without jurisdiction to decide who was entitled to the money, because there was no justiciable controversy before the Court. [See, also, *United States v. Rice*, 3 Cir., 176 F. 2d 373, 375-376.]

The order here involved, relating to the Certificates deposited with the Clerk, is obviously analogous.

If there is a bona fide dispute over ownership or other rights in the Certificates, the remedy, it is obvious, is an appropriate action—quiet title, declaratory relief or the like—by one claimant against the other. Except for diversity of citizenship or joinder of a Federal governmental agency, such an action would not be cognizable in a Federal court. Certainly, it is not made cognizable by the device of depositing the certificates, or ordering them deposited, in connection with an otherwise unrelated action pending in such a court.

Nowhere in the Return do respondents controvert Equitable's assertion that no case or controversy exists as to the certificates of deposit, because, as stated in the Petition, "no right, title or interest to the certificates of deposit was claimed by anyone other than petitioner." [*Petition*, 14.] Respondents discuss the certificates of deposit at length [*Return and Answer*, 178 *et seq.*], conceding, in the course of that discussion that Equitable has indeed a claim to them arising out of the merger.<sup>14</sup> Nowhere, however, do they assert or even intimate any adverse claim or interest by anyone else.<sup>15</sup>

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<sup>14</sup>The Certificates originally belonged to Long Beach, by purchase before the merger. [*Return and Answer*, 173, fn. 83 and footnoted text.] Under the merger agreement, all of the assets and property of Long Beach went to Equitable. [*Petition Appendix*, 137 (art. I), 138 (art. II).]

<sup>15</sup>Respondents attempt to convey the impression that Equitable has acquiesced in the Respondent Judge's assertion of jurisdiction over the certificates by its stipulation in the Superior Court to the endorsement of the certificates by the Clerk of that court. Quite the contrary is true.

The certificates in question were in the physical possession of the Clerk of the District Court but payable to the Clerk of the  
(This footnote is continued on the next page)

2. The Declaration of the Continued Existence of Long Beach Was Purely Advisory and Abstract, Unrelated to Any Live Issue or Actual Controversy Below.

Obviously, nothing concerning the corporate existence or non-existence of Long Beach was involved in determining what persons were entitled to receive, and in what amounts they were entitled to receive, the Equitable stock; or in determining how much, if any, fees were to be allowed the Protective Committee's attorney. Yet, those were the only issues in the cases in which the declaration was made. In that context, the declaration was and could only have been purely advisory. A federal court has no power or jurisdiction to make an order of that kind. Of course, a declaratory judgment may be rendered in a case regularly instituted and prosecuted to that end; but even then only in cases of a concrete and actual controversy affecting the rights or duties of the parties. [*Liberty Warehouse Co. v. Grannis*, 273 U.S. 70, 73-74, 47 S. Ct. 282, 283;

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Superior Court. The Superior Court proceeding adverted to by the respondent was initiated by Long Beach, which had been ordered by the respondent judge to petition the Superior Court for an order directing the clerk of that court to endorse the certificates over to the Clerk of the District Court. [*Petition Appendix*, 12 (paragraph 4).] The petition, prepared by Mr. Chapman and filed in the Superior Court, contained allegations unnecessary to the execution of the Order of the District Court and which could be res judicata if not controverted. [*Return Appendix*, 197.] Equitable, therefore, filed an answer to it.

To avoid the necessity of concurrently litigating similar issues before both the District Court and the Superior Court, counsel for Long Beach and Equitable stipulated that the endorsement might be made, at the same time agreeing that none of the allegations of the petition was admitted, and that all of Equitable's claims, contentions, rights and demands were preserved. [*Return Appendix*, 210-212.] Obviously, this was not a concession of jurisdiction in the District Court as respondents now assert. To the contrary, it preserved intact all of Equitable's objections to jurisdiction.

*Aetna L. Ins. Co. v. Haworth*, 300 U.S. 227, 236, 239-241, 57 S. Ct. 461, 462, 463-464.]

Nothing of that sort was involved in the case at bar.<sup>16</sup>

The fact that the Long Beach “charter” was deposited with the Clerk [*Petition Appendix*, 49]—added nothing to the court’s jurisdiction. The charter is only a document evidencing the fact that official permission to engage in a regulated business in corporate form has been given. It is not itself the corporation, or the right to do business. That right is, of course, an intangible one. An actual controversy over it, affecting some one’s rights or duties, could, no doubt, be the basis of a case. Absent such a controversy, the deposit of the document no more gave the respondent judge the jurisdiction to make a judicial declaration in respect of it, than, had a promissory note been deposited, he would have had jurisdiction, on motion in an otherwise unrelated case, to adjudge the maker obligated to pay it. [*Cf.*, *United States v. Drossner*, *supra*, 179 F. 2d 509; *United States v. Rice*, *supra*, 176 F. 2d at 375-376.]

3. The Order Relating to Equitable’s Taxes and the Installment Charity Trust Was Not Embraced Within the Scope of Any Case or Controversy Properly Before the Court Below.

Mr. Charles K. Chapman was not a party to any of the three actions below, to which these writ proceedings are directed. He has not appeared as a respondent or real party in interest in these proceedings. Nonethe-

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<sup>16</sup>If the question had been properly cognizable below, it would have to be answered quite differently from the way the District Judge answered it. [See, Point II, *Second, infra*.]

less, in those three actions he (describing himself as “holder of judgment of this Court for attorney’s fees”) and Long Beach jointly filed a motion to order all parties to discharge their respective duties and obligations under the merger agreement and “Installment Charity Trust.” [*Petition Appendix*, 183-202.] Apparently—although Mr. Chapman’s penchant for prolixity and irrelevancy of pleading makes it difficult to be sure<sup>17</sup>—what was being aimed at was the injection of representatives of Long Beach into conferences, negotiations and proceedings dealing with Equitable’s tax problem. [See, *e.g.*, *Petition Appendix*, 197-199.] The objective sought in respect of the Installment Charity is similarly obscure. It seems to center around an alleged failure on Equitable’s part to pay \$1,662.50 of pre-paid interest and to transfer a certain promissory note for \$33,600, to the Poor Sisters of Nazareth of Los Angeles, Inc. [*Petition Appendix*, 195-196.]

This much, however, is certain. The issues over representation of Long Beach in the tax proceedings and of Equitable’s obligation, if any, to the Poor Sisters, have nothing at all to do with the question of how and to whom the deposited Equitable stock should be distributed or how much, if anything, should be paid the Protective Committee’s attorney. Consequently, for the reasons to which we have already adverted, there was no “case or controversy” in the constitutional sense presented by the Chapman-Long Beach petition. [See, the cases cited, *passim*, Point I, *supra*.]

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<sup>17</sup>This Court has made a similar criticism of his pleading style. [See, *Chapman v. Goodman*, 9 Cir., 219 F. 2d 802, 805.]

If Long Beach has a justiciable right to inject itself into Equitable's tax proceedings, and the right is being denied it, no doubt relief may be obtained by an appropriate action brought in a court having jurisdiction. That court would not be a Federal court, since there is neither diversity of citizenship nor a federal-law question. How then, did the court below get jurisdiction to determine and adjudicate the asserted right? Respondents do not, they cannot, answer that question.

By the same token, if the Poor Sisters have a justiciable right against Equitable, it may be enforced by *them*, through an action in an appropriate court. Here, again, that court would very likely not be a Federal court. And, additionally, what standing does either Mr. Chapman or Long Beach have to enforce this or any other right of the Poor Sisters?

Respondents' contention apparently is that it was Equitable that brought these matters into issue below. [*Return and Answer*, 109-120.] The contention is based on the fact that T. A. Gregory, then Equitable's President, was one of those who verified Long Beach's petition for allowance of a fee to its attorney;<sup>18</sup> and that Mr. Gregory testified "on behalf of the petition for allowance of attorneys' fees . . ." [*Return and Answer*, 109.] Of course, these are immaterial circumstances. Federal jurisdiction is a limited and narrow one. Absent otherwise, it cannot be supplied by consent or stip-

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<sup>18</sup>The return does not make clear the capacity in which Mr. Gregory verified. Examination of the allowance petition will show, however, that he did so as President of Long Beach, not in any capacity representative of Equitable. [*Supp. Appendix*, 40.]

ulation, but only by the existence and proof of the facts upon which it depends.<sup>19</sup>

Furthermore, the question in respect of the Charity Trust was whether a loan incident to it was actually a loan to Mr. Chapman or a payment for legal services. The respondent judge's ruling on that question is now on appeal to this Court, as Mr. Chapman himself asserted when it suited his purpose to do so. [*Supp. Appendix*, Letter of 4/27/67.] Respondents offer no theory upon which it could be held that the respondent judge could retain jurisdiction embraced within the scope of a judgment or order on appeal. [See, *Petition Appendix*, 279.] The inconsistency between the position of the respondents who assert that a new proceeding involving the Charity Trust may be maintained, and the position of Mr. Chapman, who seeks to prosecute that proceeding but at the same time concedes that the matter is on appeal, is irreconcilable. The issues relating to the Installment Charity Trust must fall into one of two categories. Either they are issues already considered by the respondent judge and now the subject of pending appeals, because of which there was no longer jurisdiction in the trial court, or they are new matters raised after final judgment and involving new parties, presenting no basis for federal jurisdiction. Either way, the respondent judge had no jurisdiction to entertain the proceedings.

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<sup>19</sup>" . . . It is axiomatic that the district courts of the United States are courts of limited jurisdiction. No one can confer jurisdiction upon them, if it does not exist. And it may be inquired into and questioned, even by the litigant invoking it in the first instance, and despite the most solemn stipulations." *Arenas v. United States*, S.D. Cal., 95 F. Supp. 962, 972 (and numerous cases there cited in note 29), *affirmed* 9 Cir., 197 F. 2d 418.]

4. The Post-Judgment Orders Involved a Departure From the Accepted and Usual Course of Judicial Procedure. Thus, There Was No Case or Controversy, Because the Proceedings Were Not Carried on in Accordance With the Rules of Civil Procedure.

In response to our contention that there was a “departure from the accepted and usual course of judicial proceedings” [*Petition*, 25-29], an attempt is made to justify the procedure followed below, by reference to the fact that, pursuant to 28 U.S.C., sec. 2361, Equitable “obtained interpleader permanent injunctions . . .” [*Return and Answer*, 138.] The theory in that regard seems to be that by issuance of an order to show cause there was drawn within the court’s jurisdiction anything and everything that the responding parties cared to offer as “cause.”

Assuming that Section 2361 permits the District Court to issue orders to show cause and orders restraining claimants from instituting other proceedings when a complaint in interpleader is filed, there is no authority that every subsequent procedure in an interpleader case may be brought on for a hearing by an order to show cause; or that any and every desired dispute may be injected into the case by the response to the order. This would be especially true with regard to a new claim for relief or cause of action unrelated to the original complaint, as was the situation in the case at bar.

Respondents cite many cases, apparently for the proposition that an Order to Show Cause Procedure is

proper procedure in the within action. All of the cases, however, (except one California Supreme Court decision, which was cited only as a definition of an Order to Show Cause), were decided prior to 1935 and therefore are not applicable under the Federal Rules of Civil Procedure which became effective in 1938. "[S]ince the effective date of the New Rules of Civil Procedure, rules to show cause have not been properly a part of civil practice." [*U.S. v. Rollnick*, M.D. Pa., 33 F. Supp. 863, 865. See, also: *Walling v. Moore Milling Co.*, W.D. Va., 62 F. Supp. 378, 381-382.]

An order to show cause, a leading authority has said, "should be no part of the federal civil practice. A simple motion is to be preferred to a formal order to show cause which . . . if entertained at all will be treated as a motion under the rules." [Barron & Holtzoff, *Federal Practice and Procedure*, sec. 244, p. 17.] And even if such an order were proper, there would still be no basis in the instant case for the extensive adjudication made and relief given in respect of matters not in controversy or which were new and beyond the scope of the cases in which the order to show cause was issued, and which adjudication was made after all issues properly cognizable in those cases had been disposed of.

II.

**The Post-Judgment Orders Were Erroneous on the Merits, Assuming the Merits Were Properly Cognizable Below.**

For the reasons just advanced, as well as those heretofore presented [see, *Petition*, 36-39; *Petition Appendix*, 269-287], the post-judgment orders were in excess of the lower court's jurisdiction. That being so, it is immaterial here whether the orders otherwise correctly decided the matters to which they were addressed. The great bulk of the long written argument submitted by respondents is devoted, not to the cognizability of those matters but to their substantive merits. We do not propose, by replying at equal length, to divert or distract attention from the one issue really involved—which is not the correctness *vel non* of the orders, but whether the matters they purported to adjudicate were properly cognizable at all in the cases then pending. Accordingly, we will not reply at length or in detail to respondents' argument on the substantive merits.

Nonetheless, in order not to leave any impression that there is no good reply to the merits, we will sketch, in summary fashion, the nature of that reply in respect of the matters principally emphasized by respondents, *i.e.*, representation in Equitable's tax proceedings, and continued existence of Long Beach. We shall also list and briefly discuss the utter irrelevancies with which the Return is larded.

*First:* Respondents' position in respect of the tax situation is based on fears and unfounded assumptions that everyone concerned, other than Long Beach, will misconduct themselves or act negligently. The position is that the taxing authorities may attempt to

assess \$4,000,000.00 additional taxes upon a certain sum received by Long Beach in 1962 as damages and, if successful, may assert transferee liability against the former Long Beach depositors for these taxes. [*Petition Appendix*, 197-199.] The real parties in interest do not suggest that their situation is materially different from that of any corporate shareholder upon merger. Nor do they suggest that the Merger Agreement affords them a right to participate in Equitable's tax negotiations. Neither the depositors nor Long Beach is in any different posture, in respect of tax liability, from that in which any corporation that has been merged into another and its shareholders find themselves. The controlling legal principle is that it is the surviving corporation—in this case Equitable—upon whom the unpaid taxes of the merged corporation must be assessed. [*Commissioner v. Oswego Falls Corp.*, 2 Cir., 71 F.2d 673, 675.] Any improper exactions by the taxing authorities against either Long Beach or its stockholders may be remedied by the aggrieved taxpayer, precisely as any other imposition of an assertedly improper or illegal tax is remedied.

Furthermore, Long Beach's fears are illusory. As recipients of Equitable shares directly from Equitable in exchange for their existing interest in Long Beach, the former Long Beach depositors are not transferees of any Long Beach assets. [*Vending v. Comm'r.*, 2 Cir., 229 F. 2d 93.]

Of more significance, is the fact, overlooked by the respondents, that they will have the benefit of the bar of the Statute of Limitations which is imposed by Int. Rev. Code, §601(b). If the shareholders are in fact transferees of Long Beach assets, no deficiency may now be assessed against them for unpaid 1962 federal

income taxes of Long Beach. [Cf., *Commissioner v. Oswego Falls Corp.*, *supra*, 71 F. 2d at 675.]

The potential harm to Long Beach, never defined, but presented to the District Court as a real danger justifying the requested order, is equally illusory.<sup>20</sup> No act, stipulation, or waiver by Equitable can bind Long Beach Federal if, as it contends, it yet exists. [See, *Commissioner v. Oswego Falls Corp.*, *supra*, 71 F. 2d at 675.] If, however, the corporate existence of Long Beach terminated upon merger with Equitable no harm can come to it. Moreover, the Statute of Limitations has also run in favor of Long Beach Federal if it still exists.

*Second:* Long Beach does not have a present, separate existence. Regardless of whether any formal, ministerial act required either by law or by the merger agreement has been consummated, there has been a *de facto* dissolution of Long Beach. It is now a mere corporate shell, without assets or capacity to perform the functions for which it was incorporated, and without valid reason for delaying formal dissolution. Such a state of affairs amounts to a *de facto* dissolution. [See, *Hentschel v. Fidelity & Dep. Co.*, 8 Cir., 87 F. 2d 833, 836; *ABC Brewing Corp. v. Commissioner*, 9 Cir., 224 F. 2d 433, 492.]

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<sup>20</sup>In its Motion for Directions Long Beach asserted: “. . . if Long Beach were ‘un-merged’ from Equitable, . . . Equitable might retain Long Beach’s over \$88,000,000 of assets free of Long Beach Federal taxes.” [*Petition Appendix*, 199.] How this could be accomplished is nowhere explained. And, if accomplished, why appropriate redress in a court having jurisdiction could not be obtained, is also not explained. Actually, if there were an “unmerger,” any segregation of assets and liabilities would be supervised and directed upon an equitable basis by the court ordering such relief. [See, *e.g.*, *United States v. Manufacturers H. Tr. Co.*, S.D.N.Y., 240 F. Supp. 867, 956.]

Even if we apply the law applicable to dissolutions, no technical formal act by the Federal Home Loan Bank Board was required to dissolve Long Beach Federal, because official permission to dissolve was given in advance. The language of the Merger Agreement approved by the Federal Home Loan Bank Board, is this:

“The purpose of the Agreement is to provide for the dissolution of the Federal Charter of Long Beach by way of merging of Long Beach into Equitable as surviving association . . .

\* \* \*

“Long Beach shall, upon the effective date, be merged into Equitable and Equitable shall thereafter be the surviving corporation or resulting Association . . . The Separate corporate existence of Long Beach shall cease upon appropriate action by the Federal Home Loan Bank Board or by law.” [*Petition Appendix*, 137, 119-140.]

The above language, which was approved by all parties, clearly indicates an intent to terminate the separate corporate existence of Long Beach Federal upon the date of the merger, whether it is called a merger or a dissolution. Surrender of the charter is not a condition to the termination of the corporate existence of Long Beach. Section 546.4 of Title 12 of the *Code of Federal Regulations* (under which the within merger was accomplished) provides in pertinent part as follows:

“When dissolution has been consummated in accordance with the plan approved by the Board, a certificate evidencing that fact, supported by such evidence as the Board may require, shall

forthwith be filed with the Board. Upon receipt of evidence satisfactory to the Board that such dissolution has been so consummated, the Board will terminate the corporate existence of the dissolved Federal Association and its *charter shall thereby be cancelled.*" (Italics ours.)

The mandatory language of the regulation, coupled with the language of the merger agreement and the fact that Long Beach has given "evidence satisfactory to the Board that such dissolution has been so consummated" [see *Petition Appendix*, 244-246], make it clear that Board approval is now only a formal ministerial act which cannot be withheld. Thus, we reach the conclusion that the corporate existence of Long Beach Federal has terminated, even under applicable law regarding dissolution.

If "merger" law is applied to the facts of this case, it is equally clear that Long Beach ceased to exist. Equitable, as the successor by merger to Long Beach and as a corporation chartered by the State of California, continues within itself the activities of the merged corporation. Whatever existence Long Beach may yet have could only be that carried on through Equitable. [*Jackson v. Continental Telephone Co.*, 212 Cal. App. 2d 510, 28 Cal. Rptr. 1; *J. C. Peacock, Inc v. Hasko*, 196 Cal. App. 2d 363, 16 Cal. Rptr. 525 529-530; *Cal. Corp. Code* §4116. The cited section of the Cal. Corp. Code provides:

"Upon merger or consolidation pursuant to this article, the separate existence of the constituent

corporations ceases, and the consolidated or surviving corporation shall succeed, without other transfer, to all the rights and property of each of the constituent corporations . . .”]

*Third:* (1) The grossly inaccurate, even defamatory, allegations concerning verification of Equitable’s financial statements, its branch applications and its merger with Van Nuys Savings & Loan, have no relevancy to anything that was properly or even improperly before the court below. They are asserted apparently as a repudiation by Equitable of its assumption of the liabilities of Long Beach. [*Return and Answer*, 62-69.] They are plainly nothing of the kind; and there is nothing in the voluminous Return or its even more voluminous appendix to show that even so little as one cent of Long Beach liabilities have not been or will not be met by Equitable in strict conformity to the merger agreement.

(2) At pages 32-33 of the Petition, we pointed out that the order permitting participation in Equitable’s reorganization negotiations was made without any request therefor in the moving papers. As a consequence, we noted, Equitable had no opportunity to object “to its own former attorney representing an interest adverse to his former client.” Although 18 pages are devoted to a reply, there is no denial in it of the fact that there *was* a conflict of interest. The burden of the reply is that Equitable did have an opportunity to object, because its counsel were present in court when the respondent

judge made his ruling. [*Return and Answer*, 120-13.] The “ruling” relied on, was not that at all, but merely a passing comment from the Bench, made in the course of a colloquy between court and counsel. Furthermore even if it were a ruling, it did not specify Mr. Chapman as the representative of Long Beach who was to participate. [See, *Return Appendix*, 278 (lines 10-15).]

(3) The fact that in the “class action judgment” Equitable was designated an “elisor” [*Petition Appendix*, 105, paragraph VI] is of no consequence. An elisor is “a person appointed to perform certain duties pertaining to certain officers, when the latter are disqualified . . .” [*Doherty v. Kalmbach*, D.C.Cir., 87 F. 2d 539, 541, quoting *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341, 343.]

The court’s use of the word “Elisor” adds nothing to the judgment that Equitable distribute the stock pursuant to the court’s order. Equitable submitted to no more jurisdiction than any other corporation which is ordered to do a specific act to be performed, such as to distribute stock. Even if Equitable is some sort of agent of the court, there is no justification for, as respondents cite no authority to justify, ordering Equitable to file reports unrelated to the stock distribution or to appear to answer the various post-judgment motions and petitions that have been filed by Mr. Chapman.

III.

Petitioner Has No Remedy by Appeal Adequate to Protect Against the Injury to It From the Extraordinary Usurpation of Judicial Authority to Which It Is Being Subjected.

Mandamus is not being used by us as a substitute for a hearing on the merits of the three appeals now pending in this court, [*Return and Answer*, 30-35.] Respondents' suggestion to that effect is clearly without merit:

(1) *The Judgment for Attorneys' Fees.* This judgment is not a subject of the within Petition. The appeal from that judgment will not be affected by the decision at bar.

(2) *The Order that Long Beach Federal Yet Ex-its, etc.* Prior to the time the within Petition was filed, counsel for Long Beach asserted that this order was not appealable.<sup>21</sup> He now asserts that the within petition will prevent a hearing on the merits. In either case an appeal is not an adequate remedy, for the reasons adequately stated at pages 33 and 34 of the petition.

(3) *The Judgment re Taxes.* There can be no appellate hearing on the merits of the order re taxes because Equitable's compliance with the order will render an appeal moot before the appellate process can be completed. With regard to this appeal, Equitable must

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<sup>21</sup>See letter from Mr. Chapman dated April 27, 1967, *Supp. Appendix*.

seek this Writ of Mandamus or be deprived of any remedy.

Although they urge that petitioner be left to its remedy by appeal, respondents nowhere deny that the course of conduct they have pursued and intend to pursue in the future in the District Court is causing irreparable harm to petitioner. They do not disavow the expressed intent of Long Beach to bring before the court below in the pending litigation all questions regarding *Equitable's performance* of its obligations under the Merger Agreement.<sup>22</sup> They do not deny that their conduct constitutes the imposition of a second tier of management to oversee the business decisions of Equitable's management; and although they suggest no harm can come to Equitable if required to reveal Long Beach tax information to them, that is not truly the case. The process of negotiation in this area makes impossible any consideration of a single year's taxes in isolation from past and subsequent years. Further, the respondents do not deny that by their actions Equitable could be precluded from negotiating settlements it felt to be advantageous.

The withholding of \$110,000 of assets (the certificates of Deposit) from its use causes continuing harm to Equitable, yet the Return makes no mention of this or of the fact that appeal is not available as a remedy for this at all since the respondent judge has made no final order with respect to it.

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<sup>22</sup>The Return to the Petition states that one of the reasons Long Beach Federal still exists is, "To enable Long Beach Federal to centralize before said respondent District Court any and all litigation connected with or arising from said merger." [*Return and Answer*, 91.]

Finally, respondents apparently concede, for they do not deny, that unless this court orders entry of final judgment this litigation and the resultant series of appeals may never end.

### Conclusion.

A peremptory writ of mandamus and prohibition should issue, in the form, and commanding the actions and orders specified at pages 39-40 of the Petition.

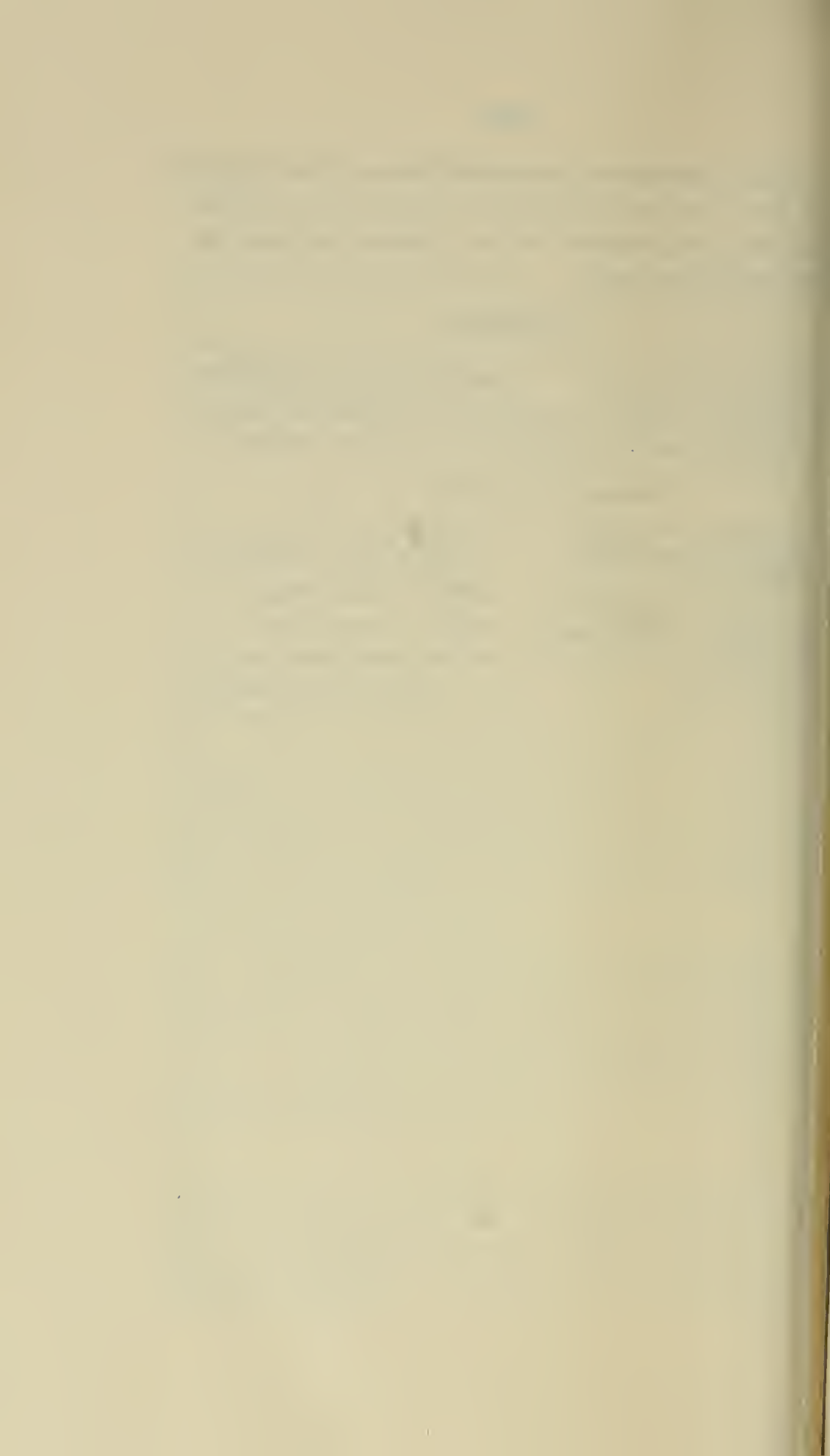
Respectfully submitted,

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### **Certificate.**

I hereby certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HERMAN F. SELVIN.

